IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO.2568 OF 2005
ALONGWITH
NOTICE OF MOTION NO.87 OF 2007
IN
WRIT PETITION NO.2568 OF 2005

The Maharashtra State Co-op.)
Cotton Growers Mkt. Federation Ltd.)
Khetan Bhavan 6th floor, 198,)
Jamshetji Tata Road, Churchgate,)
Mumbai - 400 020.) .....Petitioner.

V/s

Asha Joseph D'mello)
At-Utardon talav, Near Datt Mandir,)
Agashi, Ral. Vasai,Dist. Thane) .....Respondent.

Mr. R.M. Joshi for the Petitioner.

Mr. N.M. Ganguli for the Respondent.

ALONGWITH
WRIT PETITION NO.2569 OF 2005
ALONGWITH
NOTICE OF MOTION NO. 356 OF 2006
IN
WRIT PETITION NO.2569 OF 2005

The Maharashtra State Co-op.)
Cotton Growers Mkt. Federation Ltd.)
Khetan Bhavan, 6th floor, 198,)
Jamshetji Tata Road, Churchgate,)
Mumbai - 400 020.) .....Petitioner.

V/s

Miss Nanda Pandurang Dayalkar)

Prema, 203, 2nd floor, Agashi Road,)
Virar (West), Dist. Thane.) .....Respondent.

Mr. R.M. Joshi for the Petitioner.

Mr. N.M. Ganguli for the Respondent.

CORAM: V.M. KANADE, J.
DATE : 11th September, 2007

ORAL JUDGMENT:

1. Both these Petitions can be disposed of by a common judgment since the question involved in both these Petitions is identical.

2. Petitioner is a Co-operative Society formed by the Government of Maharashtra for implementation of the Scheme which has been evolved for protection of cotton growers in the State of Maharashtra. The respondents in both these Petitions were working on contract basis with the Petitioner herein. The respondent in Writ Petition No.2568 of 2005 was appointed on contract basis in the year 1998 and was doing the work of typing and was also a Computer Operator. The respondent in Writ Petition No. 2569 of 2005 was appointed in the year 1992 on contract basis and was a steno-typist. In 2001, respondents filed complaint of unfair labour practice under item Nos. 6, 9 and 10 of Schedule IV of M.R.T.U. & P.U.L.P. Act, 1971, alleging that the Petitioner had committed unfair labour practice and also sought

permanency in the said posts. When the Petitions came up for admission, Petitioner herein terminated services of the respondents and, therefore, notices of motion were filed by both the respondents seeking mandatory order of appointing them in the said posts. An order was passed by this Court wherein, it was directed that both the Notices of Motion would be heard alongwith the Petitions.

3. Mr. Joshi, the learned Counsel appearing on behalf of the Petitioners submitted that the Tribunal had committed an error of law, directing the Petitioner to confer status of permanency on the respondents herein. He submitted that in view of the judgments of the Apex Court in Vividh Kamgar Sabha Vs. Kalyani Steels Ltd & Anr reported in **2001 I CLR 532** and in Cipla Ltd. Vs. Maharashtra General Kamgar Union & Ors reported in **2001 I CLR 754**, it was not open for the Industrial Court to confer the status of permanency when there was a dispute regarding the relationship of employer and employee between the Petitioner and the respondents. He submitted that the Supreme Court, in the subsequent judgment, when a reference was made to the larger Bench of the Apex Court, reaffirmed the ratio laid down in Kalyani Steels (supra) & Cipla Ltd. (supra) in the case of Sarva Shramik Sangh Vs. M/s Indian Smelting & Refining Co. Ltd. & Ors reported in **AIR 2004 SC 269.** Mr. Joshi also submitted that the Tribunal had erred in recording a finding that the witness who was examined on behalf of the Petitioner had admitted that the respondents were appointed in clear

vacancies. He invited my attention to the evidence of the said witness and submitted that no such admission was, in fact, given by the said witness. He also relied on other judgments of this Court and the Apex Court in support of the aforesaid submissions.

4. Mr. Ganguli, the learned Counsel appearing on behalf of the respondents, on the other hands, submitted that it was an admitted position that both the respondents were working since 1992 and 1998 respectively and that though, initially, they were appointed on daily wages, thereafter, they were paid same pay-scales which were being paid to the permanent employees of the Petitioner - Co-operative Society. He submitted that, therefore, the Industrial Court was justified, on the basis of various judgments on which reliance was placed by the Industrial Court, in directing the Petitioner to confer the status of permanency.

5. It is not possible to accept the said submissions made by the learned Counsel appearing on behalf of the respondents. The submissions of Mr Joshi, the learned Counsel appearing on behalf of the Petitioner will have to be accepted. The Apex Court in the case of Kalyani Steels (supra) has held that in cases where there is a dispute regarding relationship of employer and employee, it was not open for the Industrial Court to examine whether unfair labour practice was committed by the employer. In the case of Indian Smelting & Refining Co. Ltd (supra), again, this

ratio in the aforesaid cases has been reaffirmed by the Apex Court and it has been held that, for cognizance of the complaint, existence of employer and employee relationship is a sine qua non and unless it is admitted by both parties, the Industrial Court cannot decide the question of unfair labour practice. It is also observed in para 21 of the said judgment as under:-

> "21. The common thread passing through all these judgments is that the threshold question to be decided is whether the industrial dispute could be raised for abolition of the contract labour system in view of the provisions of the Maharashtra Act. What happens to an employee engaged by the contractor if the contract made is abolished is not really involved in the dispute. There can be no quarrel with the proposition as contended by the appellants that the jurisdiction to decide a matter would essentially depend upon pleadings in the plaint. But in a case like the present one, where the fundamental fact decides the jurisdiction to entertain the complaint itself the position would be slightly different. In order to entertain a complaint under the Maharashtra Act it

has to be established that the claimant was an employee of the employer against whom complainant is made under the I.D. Act. When there is no dispute about such relationship, as noted in paragraph 9 of ClPLA's case (supra) the Maharashtra Act would have full application. When that basic claim is disputed obviously the issue has to be adjudicated by the forum which is competent to adjudicate. The sine qua non for application of the concept of unfair labour practice is the existence of a direct relationship of employer and employee. Until that basic question is decided the forum recedes to the background in the sense that first that question has to be got separately adjudicated. Even if it is accepted for the sake of arguments that two forums are available, the Court certainly can say which is the more appropriately forum to effectively get it adjudicated and that is what has been precisely said in the three decision. Once the existence of contractor is accepted, it leads to an inevitable conclusion that a relationship exists between the contractor and the complainant. According to them, the

> contract was a facade and sham one which has no real effectiveness. As rightly observed in CIPLA's case (supra), it is the relationship existing by contractual arrangement which is sought to be abandoned and negated and in its place the complainant's claim is to the effect that there was in reality a relationship between the employer and the complainant directly. It is the establishment of the existence of such an arrangement which decides the jurisdiction. That being the position, CIPLA's case (supra) rightly held that an industrial dispute has to be raised before the Tribunal under the I.D. Act to have the issue relating to actual nature of employment sort out. That being the position, we find that there is no scope for re-considering CIPLA's case (supra), the view which really echoed the one taken about almost a decade back." (Emphasis supplied).

The Industrial Court, therefore, in my view, had clearly erred in ignoring the ratio of these judgments and proceeding to decide the question of permanency in the said complaints. The ratio of the judgments on which reliance is placed by the

Industrial Court will not apply to the facts of the present case.

6. Hence, both the Writ Petitions are allowed. The impugned order is set aside. Rule in both the Petitions is made absolute. Both the Petitions are accordingly disposed of. Since both the Petitions are allowed and disposed of, no orders can be passed on the Notices of Motion taken out by the respondents and the Notices of Motion are disposed of accordingly. However, Labour Court is directed to decide the complaints filed by the respondents expeditiously.

(V.M. KANADE, J.)